STATE OF MICHIGAN

COURT OF APPEALS

PIONEER STATE MUTUAL INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED November 14, 2006
v	No. 263011 Tuscola Circuit Court
DONALD RIFE, Defendant/Counter-Plaintiff-Appellee.	LC No. 98-016991-CZ

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from a circuit court order following a remand from this Court in a prior appeal, *Pioneer State Mut Ins Co v Rife*, unpublished opinion per curiam of the Court of Appeals, issued November 26, 2002 (Docket No. 232157). We reverse and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant's home, which was insured by plaintiff, was damaged in a fire. Plaintiff contended that defendant intentionally caused the fire. Plaintiff filed a declaratory action and defendant counter-sued for breach of contract. The primary focus at trial was whether defendant caused the fire. At the beginning of the trial, the parties agreed that if the jury found in favor of defendant, he would be "limited at this time" to the actual cash value of the dwelling and its contents, not the replacement value. Upon replacement, the insurer would be liable for additional amounts up to the policy limits ($76,000 for the dwelling and $53,200 for the personal property.)[1] The parties did not agree on the amount of the actual cash value with respect to the dwelling or the contents. They agreed on the admissibility of an appraisal that showed the value

[1] The insurance policy included a provision that the insurer would pay "no more than the actual cash value of the damage unless: (a) actual repair or replacement is complete . . . ."

of the dwelling as $36,500. Although the parties agreed that any damages would be awarded on the basis of actual cash value, evidence concerning the replacement cost of the dwelling and the contents was introduced by plaintiff to show how much money defendant stood to gain through the loss and thereby establish his financial motive to set the fire. In closing argument, defendant asked the jury to determine that the actual cash value with respect to the dwelling was "$36,674 plus," the "plus" referring to an additional amount for loss of income defendant may have received for renting the property. The jury returned a verdict in favor of defendant and found that the actual cash value of the dwelling and contents were $76,000 and $30,000, respectively.

In a prior appeal, this Court held that the trial court abused its discretion in denying plaintiff's motion for new trial because the verdict was "unsupported by the evidence" and "clearly excessive." *Pioneer State Mut Ins Co*, *supra*, slip op at 1-2. This Court remanded "for remittitur of the jury's award" because the excessive verdict was the only error at trial. *Id.*

On remand, the trial court determined that this Court failed to consider a stipulated answer to a question that was submitted during jury deliberations, and that, contrary to this Court's decision, the verdict of $76,000 for the dwelling was not excessive. The court referred to the jury's question #3, in which the jury asked, "Under Michigan Law[,] would breach of contract entail that the Insurer would have to pay the maximum amounts on the contract?" In response, the court instructed the jury, "If you find that the insurance company breached the contract and Mr. Rife replaces his home, he would be entitled to the contract limits of $76,000. As far as the contents are concerned, he would be entitled to receive the full cost incurred in purchasing new contents." The trial court concluded that this answer supported the jury's determination that the actual cash value of the dwelling was $76,000. The trial court's conclusion regarding the excessiveness of the amount awarded for the home's contents is not indicated in the record.

Plaintiff now argues that, under the law of the case doctrine, the trial court "lacked authority to reverse" this Court and deny the order of remittitur.

II. STANDARD OF REVIEW

Whether the law of the case doctrine applies is a question of law subject to review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

III. ANALYSIS

Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court. *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). In addition, the legal questions determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. *Id.* Although the doctrine is a discretionary practice of courts generally, rather than a limit on their power, a conclusion that a prior decision was erroneous "is not sufficient, by itself, to justify ignoring the law of the case doctrine." *Booker v Detroit*, 251 Mich App 167, 182-183; 650 NW2d 680 (2002) rev'd in part on other grounds, 469 Mich 892 (2003). The doctrine "applies without regard to the

correctness of the prior determination." *Id*., p 182 (citation and internal quotation marks omitted).

Here, the trial court acted inconsistently with this Court's judgment in the previous appeal. This Court specifically held that the jury's verdict was "contrary to the jury instructions," "unsupported by the evidence," and "clearly excessive." *Pioneer State Mut Ins Co*, *supra*, slip op at 1-2. Moreover, contrary to the trial court's determination, the answer to the jury's question #3 does not demonstrate that this Court's prior decision was incorrect. Defendant was only entitled to the actual cash value at the time of trial, although he potentially could recover up to the policy limits if he repaired or replaced the property. The response to the third question correctly advised the jury, "If you find that the insurance company breached the contract *and Mr. Rife replaces his home*, he would be entitled to the contract limits of $76,000." (Emphasis added.) This response was not an admission, stipulation, or evidence that the actual cash value was $76,000.

We therefore again remand this case to the trial court for remittitur of the jury's award.[2] On remand, the trial court shall set a remittitur amount to reduce the damages for the dwelling and the contents to the highest amount that the evidence would support as the actual cash value. If defendant fails to consent in writing within 14 days to the amount set by the trial court, a new trial shall be held, limited to the issue of damages. MCR 2.611(E)(1); *Kellom v City of Ecorse*, 329 Mich 303; 45 NW2d 293 (1951).

Reversed and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette

[2] If this Court were to set the amount, it would set the remittitur at $49,713.13, so as to reduce the damages for the dwelling from $76,000 to $36,674, and for the contents from $30,000 to $13,612.87. The reduced amounts for the damages are higher than the total amount advocated in plaintiff's brief on appeal. However, plaintiff should not be heard to complain because these are the amounts requested in plaintiff's memorandum in support of its request for remittitur. These amounts are consistent with defendant's testimony regarding the value of the contents, and with defendant's closing argument regarding the amount requested for the loss of the dwelling, without inclusion of lost rent.